IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 16, 2008 Session

STATE OF TENNESSEE AND KNOX COUNTY, TENNESSEE EX REL. BEE DESELM, ET AL. v. KNOX COUNTY, TENNESSEE, ET AL.

Appeal from the Chancery Court for Knox County
No. 166797-2 Daryl R. Fansler, Chancellor

No. E2007-00913-COA-R3-CV Filed August 22, 2008

This case is one of many in a long-running controversy surrounding the structure and makeup of the Knox County government. The plaintiffs filed this action during the early stages of that controversy, seeking a declaratory judgment regarding the validity of the charter of the Knox County government. That issue has since been decided by the Supreme Court in a separate case. The trial court granted the defendants' motions to dismiss. We hold that all of the issues raised in the pleadings in this case are now moot. Accordingly, we affirm.

Tenn R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Herbert S. Moncier, Knoxville, Tennessee, for the appellants, State of Tennessee and Knox County, Tennessee, ex rel. Bee DeSelm, James Gray, John Schmid and Carl Seider.

Austin Lenoy McMullen and James L. Murphy, III, Nashville, Tennessee, for the appellee, Knox County Election Commission.

John E. Owings, Knox County Law Director, and Mary Ann Stackhouse, Chief Deputy Law Director, Knoxville Tennessee, for the appellee, Knox County, Tennessee.

Robert E. Cooper, Jr, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Janet M. Kleinfelter, Senior Counsel, Special Litigation Division, Office of the Attorney General, Nashville, Tennessee, for the appellee, State Election Coordinator, Brook Thompson.

OPINION

I.

In accordance with Article 7, § 1 of the Tennessee Constitution and Tenn. Code Ann. § 5-1-201 *et. seq*. (Supp. 2007), counties in Tennessee may be organized under either the standard, state form of county government, or the alternate, charter form of county government, sometimes called "home rule." In 1988, the voters of Knox County by referendum adopted the charter form of government. Then in 1994, by another referendum, county voters approved an amendment to the charter, subjecting various county officials to term limits. However, in 1995, the Tennessee Attorney General issued an opinion stating that such term-limit provisions in county charters are unconstitutional. Tenn. Op. A.G. No. 95-007, 1995 WL 69246 at *1 (Feb. 15, 1995). Officials in Knox County thus proceeded on the assumption that the purported term limits were ineffective.

That assumption remained officially uncontradicted until March 29, 2006, when the Supreme Court ruled that term limits in the Shelby County charter did *not* violate the state constitution. ***Bailey v. County of Shelby***, 188 S.W.3d 539, 544 (Tenn. 2006). That ruling seemed to revive the long-dormant issue of Knox County term limits as well, and raised the specter that some then-serving county officials might already be term-limited, and might therefore be ineligible for re-election in 2006.

Bailey was decided some six weeks *after* the deadline to qualify for the May 2, 2006, Knox County primary election had passed. A number of potentially term-limited county officials – twelve commissioners and several countywide officers – were on the primary ballot, and it was too late to remove their names. However, county elections officials began making contingency plans for the August 3, 2006, general election, in the event of a court decision applying ***Bailey*** to Knox County and thus disqualifying any term-limited candidates who might win their primary races on May 2.

Then the controversy took an unexpected twist. In the aftermath of ***Bailey***, one of the plaintiffs herein filed papers seeking to enforce the term limits in the Knox County charter.[1] That case, styled *Gray v. Hutchison*, Knox Co. Chancery No. 166649-1, was dismissed on April 5, 2006, for lack of standing. More significantly, the trial court opined in dicta that the Knox County charter might be *invalid in its entirety*, which would of course invalidate the term limits as well. The rationale underlying this conclusion need not be recounted here; what matters for present purposes is that this fateful dicta spurred both the present action and the Supreme Court case that has rendered this action moot.

The plaintiffs filed suit in the instant case on April 19, 2006, asking the trial court for a declaratory judgment contradicting the *Gray* dicta and affirming the charter's validity (and thus, presumably, the term limits' effectiveness). The complaint sought three forms of relief: the

[1] Actually, there were *two* such cases, one filed by James Gray and the other by John Schmid, both of whom are also plaintiffs herein. The court, in its memorandum opinion dismissing Mr. Schmid's case, adopted and incorporated its memorandum opinion dismissing Mr. Gray's case. For simplicity and ease of understanding, we refer only to Mr. Gray's case when discussing the contents of those opinions.

declaratory judgment, "additional relief" under the declaratory judgment statute,[2] and "attorney fees and cost." Meanwhile, on the same day that this action was filed, five county commissioners filed a separate lawsuit, which became known as *Jordan v. Knox County*, Knox Co. Chancery No. 166799-1. The commissioners, who stood to be disqualified if the charter (and thus the term limits) were to be ruled valid, sought to have the charter declared *invalid*, thus essentially converting the *Gray* dicta into binding precedent.

The plaintiffs in the instant case state that they attempted to intervene in the *Jordan* case, but were denied the opportunity to do so. Meanwhile, they continued to file motions in this case. On April 21, 2006, the plaintiffs amended their complaint,[3] adding new defendants and a new prayer for relief: they now sought an injunction requiring "all Defendants to comply with the Knox County Charter in each of its provisions including but not limited to the May 2, 2006 Knox County Primary Election." Then, on the day before the primary, May 1, 2006, the plaintiffs filed an application for a writ of mandamus and a motion to further amend their complaint.[4] The mandamus application demanded that county officials correct the deficiencies that had led to the *Jordan* court's ruling that the charter is invalid. The motion to amend sought to add what the plaintiffs described as separate "action" for damages, based on "acts" by county officials in alleged contravention of citizens' rights under the county charter, a state statute, a federal statute, and the state and federal constitutions. The plaintiffs later voluntarily withdrew the portions of the motion alleging federal statutory and constitutional violations. The remainder of the motion was eventually denied by the trial court, as will be discussed in more detail later. On appeal, the plaintiffs claim that they "sought a new election" in their May 1 motions, but upon carefully reviewing the record, we find no language to this effect.

The next day, May 2, 2006, the Knox County primary election occurred. Most of the possibly term-limited officials won their primaries, thus potentially qualifying them for the August general election – pending a decision on the charter. These officials won another victory, in the courtroom, when the *Jordan* trial court issued its ruling on June 5, 2006. The court essentially adopted the *Gray* dicta, holding the Knox County charter invalid and thus invalidating the term limits as well. This ruling meant that all of the May primary winners, including those who could potentially have been disqualified as term-limited, would appear on the August 3, 2006, general election ballot. Meanwhile, the Supreme Court exercised its reach-down authority, *see* Tenn. Code Ann. § 16-3-201(d) (Supp. 2007), and took appellate jurisdiction of the *Jordan* case. Oral argument was scheduled for September 6, 2006 – a month and three days after the general election.

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[2] The complaint erroneously cites Tenn. Code Ann. § 29-14-1103, which does not exist. We assume the plaintiffs intended to cite Tenn. Code Ann. § 29-14-110 (2000), which states that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper."

[3] No responsive pleading had yet been filed, so this amendment was effective under Tenn. R. Civ. P. 15.01.

[4] There still had been no responsive pleading, but Tenn. R. Civ. P. 15.01 only allows *one* amendment "as a matter of course"; subsequent amendments must be approved by the court unless the opposing party consents. Defendant Knox County did not consent, and in fact filed a motion in opposition to this motion to amend.

Eight possibly term-limited county commissioners were re-elected on August 3, 2006, as were a possibly term-limited sheriff, county clerk, register of deeds, and trustee. A few weeks later, three of the plaintiffs in the instant case filed yet another action, seeking to have the May and August elections involving term-limited officials elections declared void, the winners ousted, and new elections held.[5] The plaintiffs herein refer to that case as *DeSelm II*, and to this case as *DeSelm I*.[6] We will do the same.

On January 12, 2007, the Supreme Court released its opinion in ***Jordan v. Knox County***, 213 S.W.3d 751 (Tenn. 2007). The Supreme Court reversed the trial court, holding that the Knox County charter is valid, and thus the term limits are also valid. This ruling settled any controversy created by the *Gray* dicta, which was clearly contradicted by the Supreme Court. The ruling also meant that the twelve previously-referenced officials, who had been re-elected four months earlier, were in fact term-limited and therefore ineligible to serve. However, the Court stated:

> The terms of these public servants who are ineligible for another term do not, however, end with the filing of this opinion. Pursuant to article VII, section 5 of the Tennessee Constitution, every officer shall hold office until a successor is elected or appointed and qualified. In order to assure the continuous representation of all of the people of Knox County in local governmental affairs and as a means of preserving, without interruption, the continuation of essential governmental services, those county commissioners and state constitutional officers otherwise precluded from holding the offices to which they were recently elected may continue as de facto officers until their successors are named in accordance with law. [FN13] *See* ***Hogan v. Hamilton***, 132 Tenn. 554, 179 S.W. 128, 129 (1915); *see also* ***Cook v. State***, 91 Ala. 53, 8 So. 686, 688 (1890) (holding that a circuit clerk who was no longer qualified to serve was a de facto officer until his successor qualified).
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> FN13. Article VII, section 2 provides that "[v]acancies in county offices shall be filled by the county legislative body, and any person so appointed shall serve until his successor is elected at the next election occurring after the vacancy is qualified." See ***State ex rel. Winstead v. Moody***, 596 S.W.2d 811, 812 (Tenn. 1980).

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[5] The plaintiffs in that case also sought – among other things – to have various 2002 elections declared void, on the theory that candidates in those races were already term-limited at that time.

[6] As it happens, *DeSelm II* is also presently before a panel of this court on appeal. Its style is *DeSelm v. Jordan*, No. E2007-00908-COA-R3-CV. However, these are separate cases, and motions to consolidate were denied on both the trial and appellate level. The plaintiffs in this case frequently cite the *DeSelm I* and *DeSelm II* records interchangeably in their brief. This is inappropriate. Only the *DeSelm I* record is properly before us for purposes of this opinion, and we render our decision on the basis of that record alone.

Jordan, 213 S.W.3d at 784. As can be seen, this ruling states that the "county legislative body" – in Knox County, the county commission – had the right to appoint interim replacements for the twelve term-limited officers, eight of whom were members of the 19-person commission itself. The commission did so on January 31, 2007.

On March 5, 2007, proceedings in the instant case (*DeSelm I*) and the case seeking to void the May and August elections (*DeSelm II*), both of which had essentially been put on hold while the *Jordan* case was litigated, resumed. A hearing was held on that date on the various outstanding motions in the cases, including motions to dismiss that had been filed in this case by the various defendants. These motions to dismiss were granted, and the plaintiffs' motions to amend and application for mandamus were denied. The court held, in a memorandum opinion disposing of both *DeSelm I* and *DeSelm II* simultaneously, that it had no authority to order new elections, that both cases were otherwise moot because of ***Jordan***, and, in the alternative, that the plaintiffs lacked standing. The plaintiffs timely appealed both cases. We rejected a motion to consolidate the appeals in *DeSelm I* and *DeSelm II.*

II.

It is well-settled that motions to dismiss – whether for failure to state a claim, lack of jurisdiction, or mootness, all of which are alleged by the defendants – raise questions of law, and thus our standard of review is *de novo* with no presumption of correctness. *See* ***Northland Ins. Co. v. State***, 33 S.W.3d 727, 729 (Tenn. 2000) ("a determination of whether subject matter jurisdiction exists is a question of law"); ***Stein v. Davidson Hotel Co.***, 945 S.W.2d 714, 716 (Tenn. 1997) ("motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint"); ***Alliance for Native American Indian Rights in Tennessee, Inc. v. Nicely***, 182 S.W.3d 333, 338-39 (Tenn. Ct. App. 2005) ("[d]etermining whether a case is moot is a question of law"). "A moot case is one that has lost its justiciability because it no longer involves a present, ongoing controversy. A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party." ***Id.*** at 338 (citation omitted).

The governmental controversies underlying this case have continued apace in the 17 months since the final judgment, and recent developments – which have come to our attention by way of motions to consider post-judgment facts hereby granted by us – are significant to our mootness analysis. The aforementioned county commission meeting of January 31, 2007, at which interim replacements for the twelve term-limited officers were appointed, has become popularly known as "Black Wednesday," and those appointments were eventually invalidated – in yet another separate lawsuit by some of these plaintiffs, among others – as being in violation of the Open Meetings Act, Tenn. Code Ann. § 8-44-101, *et seq*. (Supp. 2007). This ruling, in *McElroy v. Strickland*, Knox Co. Chancery No. 168933-2, was announced on October 5, 2007. The court in that case denied a motion asking it to order a special election, stating it lacked authority to do so. Instead, the commission made a *second* set of interim appointments on February 20, 2008, ostensibly conducted in compliance with the Open Meetings Act. Meanwhile, the process of electing *permanent* replacements, who will fill out the remainder of the ousted officials' four-year terms, began with the primary election of February 5, 2008, and concluded with the general election of August 7, 2008.

Oral argument in the instant case was held on June 16, 2008, more than four months after the primary and less than two months before the general election. The plaintiffs' counsel acknowledged at oral argument that "it would be folly [for me] to suggest that we don't have an election coming up August the 7th," but nevertheless asked this court to explicitly declare the 2006 elections "void" – a declaration that the plaintiffs say has never actually been made – and order a "new election" to fill out the remainder of the interim terms. The plaintiffs' counsel stated, "I'm asking you to do that because it's not moot at this moment . . . and . . . because in the future, when these matters arise at the last minute . . . we have to be prepared next time to be able to have our courts step in[.]" The plaintiffs also apparently seek a variety of other relief, including damages and attorney fees. In addition, the plaintiffs' counsel alluded to various potential consequences of a declaration that the elections were "void," including stripping ex-officials of the salaries and benefits they received while term-limited, and possibly invalidating some official acts that were performed by term-limited officials.

Unfortunately for the plaintiffs, their pleadings in *this case* – as opposed, possibly, to various other lawsuits they have filed, none of which are properly before this court for purposes of this opinion – are far more limited in scope than the relief they now seek. "The pleadings required by the Tennessee Rules of Civil Procedure provide the vehicle for identifying and refining the matters at issue in a lawsuit." ***Rawlings v. John Hancock Mut. Life Ins. Co.***, 78 S.W.3d 291, 300 (Tenn. Ct. App. 2001). "Pleadings give notice to the parties and the trial court of the issues to be tried." ***Castelli v. Lien***, 910 S.W.2d 420, 429 (Tenn. Ct. App. 1995). "The failure to assert a claim or defense in a timely manner is generally deemed to amount to a waiver of the right to rely on the claim or defense at trial." ***Id.*** Likewise, "an unpled claim cannot be asserted for the first time on appeal." ***Rawlings***, 78 S.W.3d at 300. Moreover, this case was decided on motions to dismiss, and the adjudication of such motions is based entirely on the content of the pleadings. Tenn. R. Civ. P. 12.02.

It is clear from the pleadings in this case – specifically, the plaintiffs' complaint and amended complaint – that this case is, was, and always has been a declaratory judgment action. The plaintiffs sought a declaratory judgment clarifying the validity of the county charter – an issue that has been settled by ***Jordan***, and is therefore clearly moot, as the trial court correctly held.[7] There is simply no need for a declaratory judgment to declare what the ***Jordan*** Court already held. This matter is moot.

The plaintiffs, however, are no longer interested in a declaratory judgment. Instead, they now focus their arguments almost entirely on the validity of the 2006 elections, which they ask us to declare void. Yet nowhere in the pleadings below did they specifically ask the trial court to void any election or order any new election. As noted earlier, they did file an amendment eleven days before the May 2, 2006 primary, seeking an injunction requiring the county to "comply with the . . . Charter" in conducting the election. It is unclear precisely what the plaintiffs wanted the injunction to say, and even less clear what any injunction could have accomplished at such a late date, with ballots already printed and absentee and early voting underway. Regardless, that vague,

[7] The plaintiffs' request for mandamus is likewise moot after ***Jordan***. That issue is not raised on appeal.

eleventh-hour request for an injunction certainly cannot now support an unpled claim of voidness in the election. If the plaintiffs wanted to make the validity of the May and August 2006 elections an issue in *this case*, they needed to amend their pleadings accordingly after the elections were conducted. They did not do so; they did not even request leave of the court to do so. The pleadings in this record do not support the voiding of any election.

Moreover, it is abundantly clear from the above-stated facts, including post-judgment facts, that the validity of the 2006 elections is itself also a moot point, at least with regard to the issues that are actually discussed in this record. The plaintiffs' counsel suggested at oral argument that the election's validity is not moot because it may affect collateral questions such as salary and benefits, but those issues simply are not even remotely raised by the record in this case. The whole thrust of the plaintiffs' argument has been that the interim appointments authorized by ***Jordan*** should have lasted only until a special, or "new," election could be held, rather than until the August 7, 2008, election. Even if the plaintiffs could prove this – which we doubt, particularly given that the Supreme Court had every opportunity to so hold in ***Jordan***, yet did not do so – it would be impossible to fashion any meaningful relief at this point, as permanent replacements have already been elected, and there are now mere days remaining until the expiration of the interim appointees' terms and the inauguration of the new, duly-elected officials.

The only other claim for relief in either the plaintiffs' complaint or amended complaint is the request "for additional relief as provided for by T.C.A. § 29-14-110[]; and for attorney fees and cost." Tenn. Code Ann. § 29-14-110 is part of the chapter dealing with declaratory judgments. It states:

> (a) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.
>
> (b) The application therefor shall be by petition to a court having jurisdiction to grant the relief.
>
> (c) If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

As can be seen, this statute refers to *additional*, or "further," relief as part and parcel of a declaratory judgment. The plaintiffs cite no authority for the application of this statute where no declaratory judgment has been granted, and we have found none. Additionally, the plaintiffs' pleading on this point is extremely vague, and we would be hard pressed to determine precisely what "relief" they were, or are, requesting, and on what specific basis. In any event, this is not a proper avenue for seeking damages on the facts in this record. Likewise, the claim "for attorney fees and cost" must also be denied, since there is no underlying basis for recovery based on the pleadings in this case.

We recognize that the plaintiffs sought to amend their complaint a second time – on May 1, 2006, the day before the primary election – and we have carefully considered the contents of that

motion as well. In it, the plaintiffs requested leave to add what they described as a "third action," in addition to the "first action" for declaratory judgment and the "second action" for mandamus, alleging "damages from Knox County . . . for the acts of its officers in their official capacity." These "acts" were said to be in violation of various provisions of federal, state and county law. The plaintiffs later withdrew their federal claims, leaving only the Knox County Charter, Tenn. Code Ann. § 8-19-301 (2002), and Article I, § 8 of the Tennessee Constitution as the purported grounds for relief. The motion does not specify *which* "acts of [county] officers" gave rise to the alleged violations, or even which officers purportedly violated which laws; it states only that "[t]he allegations of the foregoing complain[t] are incorporated herein." This motion to amend was opposed by the defendants, and was eventually denied by the court on grounds of mootness in the same ruling that also declared the plaintiffs' declaratory judgment action moot.

"The denial of a motion to amend the pleadings lies within the sound discretion of the trial court and will not be reversed absent a showing of abuse of discretion." ***Hawkins v. Hart***, 86 S.W.3d 522, 532 (Tenn. Ct. App. 2001). On these facts, we do not believe the trial court abused its discretion by rejecting the plaintiffs' attempt to, in essence, piggyback a separate "action" for damages onto a lawsuit for declaratory judgment, particularly where the pleading of damages was so meager, the declaratory judgment action was moot at the time of the court's ruling, and the original, underlying basis of the entire action was another court's dicta in a wholly separate case. Moreover, we are highly doubtful that the plaintiffs could have stated a cause of action, and then proved standing and injury, under the cited provisions of state and county law. As such, we note that "[i]t is not an abuse of discretion to deny a motion to amend where the grant of the motion would be futile." ***Rentea v. Rose***, No. M2006-02076-COA-R3-CV, 2008 WL 1850911, *8 (Tenn. Ct. App. M.S., April 25, 2008) (*quoting* ***Forsythe v. Gibbs***, No. M2001-02055-COA-R3-CV, 2002 WL 1869415, *5 (Tenn. Ct. App. M.S., August 15, 2002). Accordingly, we conclude that the trial court's denial of the motion to amend was well within its broad discretion.

III.

For all the foregoing reasons, the judgment of the trial court is affirmed.[8] Costs on appeal are taxed to the appellants, State of Tennessee and Knox County, Tennessee, ex rel. Bee DeSelm, James Gray, John Schmid and Carl Seider. The case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law.

CHARLES D. SUSANO, JR., JUDGE

[8] We decline to declare this appeal frivolous.